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4 UNITED STATES DISTRICT COURT  
5 WESTERN DISTRICT OF WASHINGTON  
6 AT TACOMA

7 JON H. ROHRER, individually; and  
8 FLORENCE R. EMERSON,  
9 individually,

10 Plaintiffs,

11 v.

12 COMBINED TRANSPORT, INC., et al.,

13 Defendants.

CASE NO. C18-5950 BHS

ORDER DENYING  
DEFENDANT'S MOTION TO  
STRIKE PLAINTIFFS' EXPERT  
WITNESSES AND PRECLUDE  
EXPERT TESTIMONY,  
GRANTING DEFENDANT'S  
MOTION TO EXTEND  
DISCOVERY DEADLINE, AND  
GRANTING CONTINUANCE

14 This matter comes before the Court on Defendants Combined Transport, Inc. and  
15 David. W. Campbell's ("Defendants") motion to strike Plaintiffs' expert witnesses and  
16 preclude expert testimony, Dkt. 16, and Defendants' motion for extension of time to  
17 complete discovery, Dkt. 27. The Court has considered the pleadings filed in support of  
18 and in opposition to the motions and the remainder of the file and hereby grants the  
19 motion to extend discovery and denies the motion to strike expert witness for the reasons  
20 stated herein.

21 **I. PROCEDURAL HISTORY**

22 On October 8, 2018 Plaintiffs Jon H. Rohrer and Florence R. Emerson  
("Plaintiffs") filed a complaint for personal injuries arising out of a motor vehicle

1 collision against Defendants in the Pierce County Superior Court for the State of  
2 Washington. Dkt. 1-2. On November 11, 2018, Defendants removed the case to this  
3 Court. Dkt. 1.

4 On August 30, 2019, Defendants moved to strike Plaintiffs' expert witnesses and  
5 preclude expert witness testimony. Dkt. 16. On September 18, 2019, Plaintiffs responded.  
6 Dkt. 30. On September 20, 2019, Defendants replied. Dkt. 22.

7 On October 28, 2019, Defendants moved for extension of time to complete  
8 discovery. Dkt. 27. On November 12, 2109, Plaintiffs responded. Dkt. 29. On November  
9 15, 2019, Defendants replied. Dkt. 30.

## 10 **II. DISCUSSION**

11 First, the Court will address scheduling. Defendants request a 45-day extension of  
12 discovery, which Plaintiffs do not oppose. Dkts. 27, 29. In response, Plaintiffs requested  
13 a three-month continuance with discovery closing 45 days prior to the new trial date,  
14 which Defendants do not oppose. Dkts. 29, 30. The Court finds good cause to continue so  
15 that the parties may complete the considerable outstanding discovery. Because the parties  
16 are in agreement that the trial date should be continued and discovery should be extended  
17 through 45 days from the new trial date, the Court construes Defendants' motion to  
18 extend discovery as a motion to extend discovery and continue the trial date as described  
19 and grants the motion.

20 Second, the Court turns to the parties' discovery dispute. Defendants argue  
21 Plaintiffs' expert Dr. Lowell C. Finkleman, M.D. ("Dr. Finkleman") and his expert report  
22 were late disclosed and should be excluded pursuant to Federal Rule of Civil Procedure

1 37(c)(1) and that Plaintiffs' treating physicians should be excluded for failure to  
2 adequately disclose their opinions under Federal Rule of Civil Procedure 26(a)(2)(C).  
3 Dkt. 22 at 3, 6.

4 Under Federal Rule of Civil Procedure 37(c), the failure to comply with Rule  
5 26(a) may result in exclusion of a witness unless the failure is substantially justified or  
6 harmless. *Torres v. City of Los Angeles*, 548 F.3d 1197, 1213 (9th Cir. 2008). Though  
7 Plaintiffs' counsel could have provided additional detail regarding the specific health  
8 considerations which prevented timely disclosure of Dr. Finkleman's report to potentially  
9 support a finding of substantial justification, the Court finds the late disclosure is  
10 harmless where the parties agree that discovery should be extended and the trial date  
11 should be continued, providing Defendants time to depose Dr. Finkleman and secure a  
12 rebuttal expert if necessary.

13 Regarding the level of specificity provided summarizing the testimony of  
14 Plaintiffs' treating providers, Defendants argue that Plaintiffs' disclosure is inadequate  
15 because it does not include any detail about either of the two plaintiff's injuries or  
16 treatment. Dkt. 22 at 6. Plaintiffs counter that Defendants failed to request a meet and  
17 confer pursuant to Rule 37(a)(1) prior to filing the motion. Dkt. 20 at 8; Dkt. 23 at 1. The  
18 Ninth Circuit has found it was not an abuse of discretion for the district court to  
19 determine summaries of non-retained expert testimony were inadequate when they  
20 provided only a general overview of the topics on which the non-retained expert would  
21 testify and failed to summarize the facts and opinions to which the non-retained expert  
22 would testify. *Amezcuva v. Boon*, 754 F. App'x 551, 553 (9th Cir. 2018) (citing Fed. R.

1 Civ. P. 26(a)(2)(C)(ii)). As Plaintiffs' responses appear to primarily identify topics of  
2 treating physician testimony and lack a summary of the facts and opinions anticipated to  
3 be addressed, but Defendants failed to seek this information from Plaintiffs before  
4 requesting the Court's intervention, Plaintiffs should promptly supplement their response  
5 with a summary of the facts and opinions to which each treating physician is expected to  
6 testify. *See Pineda v. City & Cty. of San Francisco*, 280 F.R.D. 517, 523 (N.D. Cal. Mar.  
7 9, 2012) (explaining that Rule 26(a)(2)(C) disclosure helps the other party prepare for  
8 deposition and/or identify which witnesses it needs to depose). The Court expects that  
9 supplemental disclosure will render this issue harmless.

10 If after the additional period of discovery Defendants continue to believe they are  
11 prejudiced by the issues identified, Defendants may revisit these issues with the Court.

### 12 **III. ORDER**

13 Therefore, it is hereby **ORDERED** that Defendants' motion to strike expert  
14 witnesses and preclude expert testimony, Dkt. 16, is **DENIED**, and Defendants' motion  
15 to extend discovery (and continue trial date), Dkt. 27, is **GRANTED**. The parties shall  
16 work with the Courtroom Deputy to schedule a new trial date.

17 Dated this 17th day of December, 2019.

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20 BENJAMIN H. SETTLE  
21 United States District Judge  
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